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SUPREME COURT, U.S.

NO. 80-6614

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RANDY GREENAWALT,

Petitioner,

ORIGINAL COPY

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT

OF ARIZONA

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTION

Respondent agrees that the Petition is timely filed, having been filed within 60 days of the denial of rehearing by the Arizona Supreme Court. However, under this Court's 1980 revision of its rules, the proper citation is to Rule 20.1 and 20.4.

STATEMENT OF THE CASE

Petitioner's Statement of the Case is, for the most part, accurate and acceptable to respondent; there are, however, some details which bear correcting. (1) The argumentative statement that the pretrial publicity was "prejudicial" (Petition at 8) is not accepted; the Supreme Court of Arizona held precisely the opposite view of the publicity. (2) It was never demonstrated on the record that petitioner's initial appearance was delayed in order to subject him to further interrogation. (Petition at 9.) (3) All persons were not "searched" every time they entered the courtroom. (Id.) Whether the jurors were electronically scanned depended upon the degree of control possible when they left the courtroom. (See response to Question Presented No. 5, infra.) Other aspects of the facts will be expanded upon at appropriate points in the argument which follows.

REASONS FOR DENYING THE WRIT

At the outset it should be pointed out that there is what might be termed a technical or formal reason for denying this Petition. Rule 21.5 of this Court states quite plainly that a failure to present with "clearness whatever is essential to a ready and adequate understanding of the points requiring consideration" will be grounds for denial. Respondent submits

that, while brevity is generally a virtue this Petition is so brief that it fails to adequately inform the Court of what petitioner is complaining about, or why. For example, this Court in Rule 17.1(b) and (c) has provided guidelines as to the considerations bearing on whether or not certiorari should be granted in cases originating in the state courts:

> (b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Apart from one unilluminating reference to Miranda v. Arizona (in Question Presented No. 3), petitioner has completely failed to point out any conflict between the decision of the Arizona Supreme Court in this case and any decision of any other court, any action on questions of federal law so important they should be settled by this Court, or any conflict with the decisions of this Court. While Rule 17.1 is not, of course, absolutely controlling, the complete lack of compliance with it and with Rule 21.1 (j) seems indicative of the fundamental meritlessness of this Petition.

Even petitioner's feeble attempt to create a showing of decisional conflict (Petition at 9) is doomed to failure. The unidentified decisions he refers to are Richmond v. Cardwell, 450 F.Supp. 519 (D.Az. 1978) and State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), cert. denied 440 U.S. 924. Richmond v. Cardwell came first, on April 21, 1978, and held in a habeas corpus action that Arizona's death penalty statute was unconstitutional, as containing a limitation on the mitigating cir-

cumstances which could be presented. That was followed on July 3, 1978 by this Court's decision in Lockett v. Ohio, 438 U.S. 586, which struck down an Ohio statute on the same grounds. On July 20, 1978 the Arizona Supreme Court announced State v. Watson, which found the limitation on mitigation to be unconstitutional, but preserved the statute by severing the limitation. Petitioner's escape, murders, and recapture took place between July 30 and August 11, 1978. Thus, it is clear that rather than any conflict, there is in fact unanimity about the Arizona death penalty statute. This unanimity was conclusively demonstrated on April 18, 1980 when the same Federal District Court judge who had authored Richmond v. Cardwell issued Knapp v. Cardwell, No. CIV 78-385 PHX CAM (April 18, 1980.) (not yet published; copy is appendix II to this Response). That decision affirmed the validity of the action taken in Watson, and held that the Arizona statute was constitutionally utilized in sentencing persons to death under the guidelines set up in Watson.

In short, petitioner has given this Court nothing, in either his "Questions Presented" or his 124-word statement of "Reasons for Granting This Petition", which actually provides any warrant for granting the Petition. Further, this initial impression of meritlessness is amply supported by even a brief perusal of the facts and law pertinent to each of his specific "Questions Presented":

1. Failure to appoint public opinion pollster.

Petitioner's discussion of this issue in his Opening Brief to the Arizona Supreme Court is attached as Appendix I to this Response. Even the most cursory examination of that argument and the manner in which the Arizona Supreme Court resolved it (Appendix A to Petition at 3-4) leaves no doubt that this matter was presented

and decided below purely as a question of state statutory construction; the Federal constitutional question was neither briefed nor considered. Under 28 U.S.C. § 1257 (3) this Court may not pass upon federal questions which have not been "set up or claimed" in the state court.

> "[W]hen as here there can be no pretence that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this Court accepts the decision whether right or wrong. Nickel v. Cole, 256 U.S. 222, 225, 41 S. Ct. 467, 468, 65 L.Ed. 900."
> Wolfe v. North Carolina, 364 U.S. 177, 195 (1960).

This is just such a case, so this Court lacks jurisdiction to deal with Question Presented No. 1.

2. Limitation on use of an investigator. This Court has repeatedly made clear that it does not sit to give advisory opinions, or to pass upon merely abstract and hypothetical issues. In order to possess the sort of personal stake which confers standing, the party seeking review must be able to allege some actual or threatened injury to himself. See, e.g., Linda R.S. v. Richard D., 410 U.S. 614, 616-17 (1973). The Arizona Supreme Court specifically found that the record of this case revealed no instance in which the trial court "either denied such a request for an investigator or refused a requested area of investigation..." (Appendix A to the Petition at 5.) Petitioner can, therefore, point to no actual personal injury, and this claim fades into the hypothetical, non-justiciable category.

3. Claimed violations of right to silence and right to counsel. Petitioner has asserted that in the process of interrogating him after his capture, the Arizona authorities violated his right to remain silent as well as his right to the assistance of counsel. These issues were exhaustively considered

by the Arizona Supreme Court and decided against him (see Appendix to Petition at 5-15), but this Court's very recent action in reversing the Arizona Supreme Court on an interrogation question, Edwards v. Arizona, No. 79-5269, ___U.S.___, 29 Cr.L. 3037 (May 18, 1981), may lend petitioner's allegations of error an appearance of validity they do not actually possess. Careful comparison shows that this case does not suffer from the analytical defects present in the Arizona Supreme Court's approach to Edwards, and is also factually distinguishable from it.

This Court pointed out that a major problem in Edwards was the Arizona Supreme Court's truncated mode of analysis; all the Miranda considerations were lumped together under the head of "voluntariness", and no attempt was made to focus separately on whether Edwards had knowingly and intelligently waived his right to counsel, in accordance with Johnson v. Zerbst, 304 U.S. 458 (1938). The situation in this case is very different. Here the Arizona Supreme Court did deal at length with whether or not petitioner's statement to the authorities was voluntary. (Appendix to Petition at 12-15.) However, before even getting to the matter of voluntariness it had separately dealt with the knowingness and intelligence aspects of the rights waiver. The specific Johnson v. Zerbst language, as reiterated in Brewer v. Williams, 430 U.S. 387 (1977) and applied in a prior Arizona case, was quoted. (Appendix to Petition at 10.) The Arizona Supreme Court then specifically stated:

> The trial court's denial of the motion to suppress was correct. That appellant knew and understood his constitutional rights to remain silent and to have an attorney present during questioning is evidenced by his exercise of those rights. Further, appellant through intelligent exercise of his rights controlled all questioning by selectively choosing which officers with whom he would speak.... He controlled the questioning by responding only to the specific questions he wanted to answer and refusing to respond to others.

(See also the summary of findings, id. at 14-15.) Thus, there is no question that all of petitioner's contentions were properly analyzed by the Arizona Supreme Court.

Of even greater importance, however, is a very basic factual distinction between this case and Edwards: Robert Edwards never saw a lawyer before being re-interrogated, while petitioner had consulted with counsel only a short time before the questioning which led to the statements introduced against him. The detective who obtained that statement testified at the suppression hearing:

> Q. "And you, yourself, were never told by anyone that Mr. Greenawalt had previously requested an attorney?
>
> A. He told me, he, himself, told me that he had an attorney, but he still wanted to talk to me about certain things."
>
> (Appendix to Petition at 11.)

This single statement should lay to rest all of petitioner's Fifth and Sixth Amendment claims - he knew he had a right to silence, he knew he had a right to counsel, he had seen his attorney, and deliberately chose for purposes of his own to selectively waive those rights. There may be a "heavy burden" on the state to prove valid relinquishment of such rights, Brewer v. Williams, supra, but if ever there was a case where that burden was sustained, this is it.

4. Pretrial publicity. The topic of pretrial publicity was examined in exhaustive detail by the Arizona Supreme Court, which considered all the possible remedial measures proposed because of the publicity (such as continuance of the trial date, voir dire format, jury sequestration, and change of venue or venire), as well as the nature of the jurors ultimately selected and the type of media coverage which allegedly prejudiced them. (See Exhibit A to the Petition at 15-24.) It concluded that the trial atmosphere had not been tainted, as it had been in the cases where

this Court found it necessary to intervene, and that regardless of the publicity the jury finally chosen was a fair and impartial one (as demonstrated by an extremely careful but remarkably uncomplicated voir dire). There being neither the "corrupted atmosphere" of Sheppard v. Maxwell, 384 U.S. 333 (1966), which created a presumption of prejudice, nor the actual prejudice revealed through a painfully protracted voir dire described in Irvin v. Dowd, 366 U.S. 717 (1961), there is no reason for this Court to review the matter.

5. "Searching"of jurors. Security matters have traditionally been left to the sound discretion of the trial court and it is up to the defendant to show prejudice. See e.g., United States v. Kress, 451 F.2d 576 (9th Cir. 1971) cert. denied 406 U.S. 923; United States v. Bankston, 424 F.2d 714 (5th Cir. 1970); Gregory v. United States, 365 F.2d 203 (8th Cir. 1966), cert. denied 385 U.S. 1029; Dupont v. Hall, 555 F.2d 15 (1st Cir. 1977). What petitioner characterizes as a "search" apparently was no more than electronic scanning, (R.T. Vol. III at 319; 383, line 26, 388.) The use of this relatively unobtrusive security measure was appropriate because of the high feelings likely to be generated by the totally unnecessary mass murders with which petitioner was charged, and the physical circumstances of the trial. The Yuma courthouse is a cramped and antiquated structure. (R.T. Vol. I at 73; Vol. II at 220; Vol. III at 359.) In fact, a separate jury room was not always available, depending on the status of cases being tried in other courtrooms. (Vol. II at 229.) Most importantly, the jurors had to enter the courtroom through the same door used by spectators. (Vol. VI at 997, lines 18-19.) This obviously made it difficult to maintain security; jurors and spectators would often be intermingled as they entered the courtroom after a recess. When the security personnel

were able to keep tabs on the jurors, because they were able to use a jury room or stayed on the floor where the courtroom was located, they were not scanned. (Vol. VI at 933.) At other times, when such separation could not be accomplished, the scanning was necessary. Similar use of magnetometers has been repeatedly upheld in both Federal and state courts. See United States v. Howell,514 F.2d 710 (5th Cir. 1975), cert. denied 429 U.S. 838; United States v. Kelly, 551 F.2d 760 (8th Cir. 1977), cert. denied 433 U.S. 912; State v. Myrick, 616 P.2d 1066 (Kansas 1980). There being neither abuse of the trial court's discretion nor any demonstrated prejudice to petitioner, this issue does not merit review.

6. Per se unconstitutionality of death penalty. That capital punishment is not unconstitutional has already been settled by this Court. Gregg v. Georgia, 428 U.S. 153 (1976).

7. Severability of defective portion of Arizona death penalty statute. This Court has repeatedly pointed out that the "state courts are the ultimate expositors of state law, . . . and . . . we are bound by their constructions except in extreme circumstances . . .". Mullaney v. Wilbur, 421 U.S. 684, 691, 95 S.Ct. 1881, 1886, 44 L.Ed.2d 508, 515 (1975). The severability of a state statute is a state question and the decision of the state court is conclusive because the task of determining the intent of the state legislature, like the function of interpreting a state statute, rests primarily with the state courts. See, e.g., Charles Wolff Packing Co., v. Court of Industrial Relations of Kansas, 267 U.S. 552 (1925). Therefore, this issue raises only a non-Federal question, and is not a proper basis for action by this Court.

8. Supposed transgression of Arizona constitution. This is plainly a matter of state law only, which this Court lacks any jurisdiction to address.

9. Ex Post Facto Clause. The Arizona Supreme Court's action in Watson was both procedural and ameliorative, and as such could not have been an Ex Post Facto Clause violation. Dobbert v. Florida, 432 U.S. 282 (1977). However, even if Watson could have been such a violation as to others, such as those who had been convicted prior to Watson, it could not possibly have been ex post facto to petitioner; the Watson decision was announced on July 20, 1978, ten days before petitioner's prison break and murderous rampage.

10. Bill of attainder. The decision in Watson, by definition, is incapable of being a bill of attainder. "A bill of attainder is a legislative act, which inflicts punishment without a judicial trial." Cummings v. Missouri, 71 U.S. (4 Wall.) 277, 323, 18 L.Ed. 356, 363 (1967); see also United States v. Brown, 381 U.S. 437, 85 S.Ct. 1707, 15 L.Ed2d 484 (1965). A decision by a court obviously is no legislative act at all, and no penalty will be imposed as a result of Watson except pursuant to a normal, court-imposed sentence.

11. Sufficiency of notice. While it is not plainly stated in the Petition, petitioner's due process contention below was that the alleged conflict between the decision of the District Court of Arizona in Richmond v. Cardwell and the Arizona Supreme Court's action in Watson created such ambiguity about the status of Arizona's death penalty that he lacked adequate notice of the penalty he faced for murder. This position is untenable. A United States District Court is not a court of last resort, so there really was no conflict at all, and the very fact that petitioner claims ambiguity indicates awareness that the State of Arizona would probably still attempt to impose death for murder. Thus, the capital punishment statute continued to exist as an "operative fact" and petitioner had enough notice to guide his conduct. Cf. Dobbert v. Florida, supra.

12. Lack of explicit standards for comparing aggravating and mitigating circumstances. The lack of such standards has already been held by this Court not to violate the Constitution. Proffitt v. Florida, 42 U.S. 242, 257-58 (1976).

13. Burden of proving mitigation on defendant; insufficient burden on state in proving aggravation. This Court has held that a burden of proof may be allocated to the defendant, even at the guilt-innocence stage. Patterson v. New York, 432 U.S. 197 (1977) (proof of affirmative defense). Under the Arizona death penalty statute, the defendant has the burden of showing anything only at the sentencing stage, after guilt has been determined, and only where an aggravating circumstance has been established; if no aggravating factor is present, a life sentence would be automatic. The principle established in Patterson clearly governs here, and so requiring proof of mitigating factors by the defendant, who obviously is in a substantially superior position to know about them is certainly acceptable under the Constitution. As for the prosecution's burden of proof on aggravating circumstances, this has been held to be proof beyond a reasonable doubt, State v. Jordan, 126 Ariz. 282, 614 P.2d 825 (1980), and Jordan was specifically referred to by the Arizona Supreme court in answering this contention. (Appendix A to Petition at 44.) It must, therefore, have found that the aggravating circumstances in this case had been proved beyond a reasonable doubt when it stated that they had been "properly established". (Id. at 37.) No higher burden has ever been required in any phase of a criminal case, so none should be imposed now.

14. Death penalty for felony murder. The legal question of whether the death penalty can be imposed in a felony murder case seems to have been answered by the various opinions in Lockett

v. Ohio, 438 U.S. 586 (1978). Though varying in the details of their approaches, six memebers of this Court indicated that, in appropriate circumstances, death could be imposed in a felony-murder case. Justice Rehnquist flatly rejected the proportionality analysis utilized by Justice White. 438 U.S. at 635-36. The plurality opinion, joined in by Justices Burger, Stewart, Powell, and Stevens, required only that all circumstances of the offense must be open to examination as mitigating factors. (Id. at 604-608.) There was never any suggestion that death could not be imposed simply because the case was tried under a felony-murder rule. Justice Blackmun likewise demanded only that the defendant's degree of participation be a mitigating factor available for consideration in sentencing. (Id. at 613-617.) That is precisely what was required by the Arizona statute, which included the following as specified mitigating factors, even before the Arizona Supreme Court severed the limitations on mitigation evidence:

> "3. He was a principal, under §13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.
>
> 4. He could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person."
> Ariz. Rev. Stat. Ann. §13-454(F) (now §13-703(G)).

This leaves only the question of the propriety of the death sentence in this particular case, which largely depends on the facts. In his statement of the question, petitioner suggests that he was not directly involved in the murders, but the record is otherwise. While no one testified to seeing petitioner pull the trigger, it was very clear that he had actively participated in every aspect of the prison escape,

evasion of pursuit, and attempts to avoid recapture. (See Appendix A to the Petition at 2-3, 6, 8, 25-26, 29, 32-33, 39.) As a result, the Arizona Supreme Court was quite unable to conclude that his participation in the crime was minor. (Id. at 44-45.) Moreover, though provided a clear opportunity at the aggravation-mitigation hearing to present evidence of his degree of participation, which could perhaps have shown that the death sentence was not appropriate, petitioner did not do so. There being substantial evidence that petitioner was fully active in every facet of the gang's illegal odyssey, and he, the one who knows, having shown nothing to the contrary, it hardly lies with him to claim that the sentence is disproportionate. This is particularly true when it is noted that the sentencing judge specifically took petitioner's conviction on a felony-murder theory into account as a possible mitigating circumstance. (R.T. Vol. VII at 1144.) Petitioner received the benefit of every consideration but when the weighing was done the depravity of his crimes, combined with the wickedness of his prior life (i.e., two other murder convictions), made it clear both to the trial court and the Arizona Supreme Court that death was the appropriate penalty. This Court should not interfere with that outcome.

C O N C L U S I O N

This Petition does not present the sort of "special and important reasons" required by Supreme court Rule 17.1 before the writ of certiorari should issue. The Petition must, therefore, be denied.

No. 80-6614

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ARGUMENT AND AUTHORITIES

I.

THE TRIAL COURT ERRED IN REFUSING TO GRANT THE APPELLANT'S REQUEST FOR APPOINTMENT OF AN EXPERT TO CONDUCT A PUBLIC OPINON SURVEY.

The appellant filed a request for the appointment of an expert for the purpose of conducting a public opinon poll in order to determine the extent to which the pre-trial publicity in this case had permeated the community. Citing Rule 10.3(b), Rules of Criminal Procedure, 17 A.R.S., the appellant pointed out that he was required to establish that the prejudicial pre-trial publicity would probably result in the appellant's being denied a fair trial.

It is the appellant's position that where, as in this case, the public has been subjected to an extended barrage of highly inflamatory publicity directed against a defendant, it is difficult to apply traditional standards in determining whether or not fair and impartial jurors may be chosen in a locality. This position is recognized by Rule 462, Uniform Rules of Criminal Procedure (Vol. 10, Uniform Laws Annotated, Master Edition, West (1974)). That rule provides that a motion for change of venue may ". . . be supported by qualified public opinon surveys or opinion testimony of individuals."

Such surveys are no longer mere numerical surveys but, rather, are now professionally designed to determine the actual opinions held by members of the public and the strength

Appendix I.

of such opinions. This is especially important in cases such as this where the sheer quantum of publicity, irregardless of the person's specific recall of particular matters, has had a serious impact upon their state of mind. Such effects are not readily demonstrable by the use of affidavits and the traditional voir dire procedures, relying as they do upon specific responses to specific and unweighted questions. The use of experts, trained in proper sampling techniques, is indispensible in such cases.

The appointment of experts in capital cases is specifically provided for by Sec. 13-1673, A.R.S., as amended. It was, therefore, error for the trial court to deny this request.

II

THE TRIAL COURT ERRED IN LIMITING THE USE OF AN INVESTIGATOR FOR THE APPELLANT TO MATTERS PRESENTED TO AND APPROVED BY THE COURT.

The appellant filed a request for the appointment of an investigator to assist the appellant's counsel in the preparation of this matter. The Court, upon hearing the request, entered the following order as a part of the minute entry to the omnibus hearing held on September 12, 1978:

> "IT IS NOW ORDERED: an investigator will be appointed from time to time based upon counsel's representation to the Court of the necessity of an investigation. These requests will be heard by the Court alone, in camera."

Later, in the same minute entry, the order was modified as follows:

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

JOHN HENRY KNAPP, et al.,
Petitioners,
vs.
HAROLD J. CARDWELL,
Respondent.

No. CIV 78-385 PHX CAM

OPINION
AND
ORDER

On May 13, 1978, petitioner John Henry Knapp, an inmate on Arizona's death row, brought before this Court, pursuant to 28 U.S.C. § 2254, a Petition for Writ of Habeas Corpus, seeking to enjoin his execution by respondent. After court proceedings in this, and other related cases, Knapp's action has reached its present posture. A brief historical review will be helpful to an understanding of the issues presented to the Court.

In 1973, the Arizona legislature adopted A.R.S. §§ 13-453[1] and 454[2], both of which have since been repealed. Section 13-453 stated that upon conviction of murder in the first degree, a defendant could be sentenced to either death or to life imprisonment without parole for twenty-five years. Section 13-454 set forth the procedure by which the death penalty could be imposed. It provided that once the state proved the existence of one or more

Appendix II.

of the "aggravating circumstances" contained in subsection E of the statute, the burden of proof switched to the defendant to establish "mitigating circumstances." If the defendant were unable to do so, death was mandatory. Subsection F of Section 13-454 listed four mitigating circumstances that could be considered by the court.

On December 20, 1976, in State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1977), the Arizona Supreme Court held that the mitigating circumstances enumerated in A.R.S. § 13-454(F) were intended to be exclusive and that sentencing courts were powerless to consider other factors such as defendant's age, his prior record, or the extent of his cooperation with the authorities. The court's restrictive interpretation of subsection F was reaffirmed in State v. Bishop, 118 Ariz. 263, 576 P.2d 122 (1978).

On April 21, 1978, two death-row inmates petitioned this Court for writs of habeas corpus, pursuant to 28 U.S.C. § 2254, alleging the unconstitutionality of A.R.S. § 13-454 as interpreted in State v. Richmond, supra, and State v. Bishop, supra. Richmond v. Cardwell, 450 F.Supp. 519 (D. Ariz. 1978). The Court concluded that the failure of Section 13-454 to permit consideration of all relevant mitigating circumstances violated petitioners' rights under the eighth and fourteenth amendments of the United States Constitution and enjoined the state from putting petitioners to death. Id. at 526.

On May 2, 1978, the Arizona Supreme Court directed the execution of John Henry Knapp. Knapp immediately instituted the present action, alleging that the Court's reasoning Richmond v. Cardwell, supra, as applicable to all inmates on Arizona's death row. On May 12, 1978,

this Court entered an order permitting Knapp's suit to proceed as a class action under Rule 23(b)(1) and (b)(2) of the Federal Rules of Civil Procedure and enjoined respondent from imposing the death penalty on any State prisoners.

On July 3, 1978, the United States Supreme Court decided Lockett v. Ohio, 438 U.S. 586 (1978), and Bell v. Ohio, 438 U.S. 637 (1978), in which it struck down Ohio's death penalty statute for the same reasons given by this Court in Richmond v. Cardwell, supra.[3]

On July 20, 1978, the Arizona Supreme Court handed down State v. Watson, 120 Ariz. 441, 586 P.2d 1253 (1978), in which the court addressed the effect of Lockett on its position that Section 13-454 limited the mitigating circumstances that could be considered by a sentencing court with respect to defendants convicted of first-degree murder. Although the Arizona court found this restriction unconstitutional, it held that had the state legislature been aware of the problem, it would have permitted consideration of all relevant mitigating circumstances. Thus, the court ruled that the constitutional portion of A.R.S. § 13-454 was "severable" from that which was unconstitutional, and remanded defendant's case for resentencing under the newly-construed statute.

On May 1, 1979, the Arizona legislature adopted the present version of A.R.S. § 13-703[4] which, in essence, codified the changes made in State v. Watson, supra. As a result of the Watson decision, and the enactment of Section 13-703, Arizona's death row now consists of the following groups of inmates: those sentenced or resentenced pursuant to Watson; those sentenced pursuant to Section 13-703; and those sentenced prior to Watson whose

resentencing is now pending. This opinion is concerned only with the effect of the Watson decision on the constitutionality of the death penalty in Arizona. The validity of Section 13-703, or the sentences of those sentenced pursuant to it, is not at issue in this case.

THE PRESENT MOTION

On January 9, 1980, respondent moved to dissolve this Court's injunction of May 10, 1978, on the basis that the above inmates had been (or will be) sentenced under a procedure that permits consideration of all mitigating circumstances.[5] Petitioners, through counsel, filed numerous responses, some of which raised a variety of legal issues.[6] Oral argument was held on February 25, 1980, after which the Court took the matter under advisement. Since oral arguemnt, two petitioners have filed supplemental memoranda, and respondent has replied thereto.

At the heart of respondent's motion is the validity of the Arizona Supreme Court's decision in State v. Watson, supra. There is no question that Watson professes to remedy that which was the basis of this Court's original injunction. The issue is whether the means chosen by the Arizona Supreme Court are subject to constitutional objections.

DID WATSON DELETE LANGUAGE FROM SECTION 13-454?

Several petitioners argue that the Watson Court deleted subsection F from Section 13-454, thereby severing the statute's list of the mitigating circumstances a court must consider in its decision whether to impose death. From this proposition, it is urged that all statutory reference to subsection F is meaningless and that Section

13-454 is rendered void for vagueness. Alternatively, it is argued that without subsection F, sentencing courts are no longer permitted to consider any mitigating circumstances -- a clear violation of the eighth amendment. This Court's analysis of Watson makes it unnecessary to address the merits of either of these contentions.

While Watson was not overly explicit as to the means by which it constitutionalized Section 13-454, a close reading of the case makes it apparent that the Arizona court altered the statute through reinterpretation rather than by deleting specific statutory language. This conclusion is supported by two findings. First, the restriction on mitigating circumstances that was "severed" in Watson cannot be found in the express language of Section 13-454. Rather, it was the product of the court's prior interpretations in State v. Richmond, supra, and State v. Bishop, supra. Second, at no point in the Watson decision did the court invalidate or strike specific language of Section 13-454. It removed only that portion of the statute which restricted mitigating circumstances.

Section 13-454 contains no language which demands the restrictive view of State v. Richmond and State v. Bishop that "subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F." State v. Richmond, 114 Ariz. at 204, 560 P.2d at 50. Subsection F gives no express indication of whether its list was intended to be illustrative or exclusive. It merely states "mitigating circumstances shall be the following . . . ."[7] While subsection D requires the sentencing court to "take into account the . . . mitigating circumstances enumerated in subsection F," it stops short of limiting the court to

those circumstances. Instead, subsection D states that the sentencing judge "shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency." (Emphasis added.)

Since the restriction on mitigating circumstances with which Watson was concerned cannot be found in the express language of subsections D or F, it must have been the product of judicial interpretation. This being the case, it is more likely that the court would remove the restriction by reinterpretation rather than by severing an identifiable portion of the statute.[8]

The view that the Watson decision was intended to overrule the Arizona Supreme Court's own restrictive interpretations of Section 13-454 in State v. Richmond and State v. Bishop, rather than to delete specific statutory language is supported by a careful examination of the Watson opinion itself. Nowhere did the court state that subsection F in its entirety was unconstitutional. It merely invalidated that provision "insofar as it limits the right of the defendant to show additional circumstances . . . ." State v. Watson, 120 Ariz. at 445, 586 P.2d at 1257 (emphasis added).[9] Similarly, the court never expressed the desire to excise particular words or subsections from Section 13-454. Rather, the court spoke of the "unconstitutional portion" and the "offending portion," id. at 445, 586 P.2d at 1257, and held that "the statute remained in full force and effect and that only the portion limiting the factors in mitigation should be set aside." Id. at 452, 586 P.2d at 1264 (emphasis added). At no point did the court set aside the "factors" themselves.

This Court's reading of Watson convinces it that when the Arizona Supreme Court posed the question "whether the constitutional and unconstitutional portions of A.R.S. §§ 13-453 and 454 are severable so that the constitutional portion of the statute can remain in force and effect," State v. Watson, 120 Ariz. at 445, 586 P.2d at 1257, the court was not speaking in terms of lopping off actual statutory language. It was merely asking whether the statute could stand without its restrictive interpretation.[10] So viewed, the post-Watson version of Section 13-454 is neither void for vagueness nor violative of the eighth or fourteenth amendments.

JUDICIAL LEGISLATION

Petitioners argue that the Arizona Supreme Court's alterations of Section 13-454 are unconstitutional in that they are supported by neither the legislative history nor the language of the statute.[11] In the face of such contentions, the role of a federal court is limited.

The Supreme Court has established that state courts can use statutory interpretation to validate otherwise questionable death penalty statutes. Lockett v. Ohio, supra; Proffitt v. Florida, 428 U.S. 242 (1975).[12] Moreover, it is axiomatic that courts should construe legislation in a constitutional manner "if fairly possible." Crowell v. Benson, 285 U.S. 22, 62 (1932). See also Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973). So far as federal courts are concerned, the general rule is that the statutory interpretation of the highest court in the state is "as though written into the [statute] itself," Poulos v. New Hampshire, 345 U.S. 395, 402 (1953), and that state courts "have the final authority to interpret and, where

they see fit, to reinterpret that State's legislation." Garner v. Louisiana, 368 U.S. 157 (1961) (emphasis added). See also, Wainright v. Stone, 414 U.S. 21, 22-23 (1973); N.A.A.C.P. v. Button, 371 U.S. 415, 432 (1963); Winters v. New York, 333 U.S. 507, 514 (1947). In passing on the question whether a Kansas antitrust statute was an unconstitutional infringement on the freedom to contract, the Supreme Court stated:

> It is well settled that in cases of this kind the interpretation placed by the highest court of the State upon its statutes is conclusive here. . . . Nor is it material that the state court ascertains the meaning and scope of the statute as well as its validity by pursuing a different rule of construction from what we recognize. . . . The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.

Smiley v. Kansas, 196 U.S. 447, 455 (1904).

Petitioners argue that the Arizona Supreme Court's reinterpretation of Section 13-454 is nevertheless subject to federal review for the reason that its construction is manifestly unreasonable. Assuming for purposes of argument that such a finding would place petitioners within an exception to the general rule,[13] this Court's reading of Section 13-454 defeats petitioners' argument. While Arizona's death penalty statute is not explicit on the issue of mitigation, this Court does not find the Watson Court's construction to be unreasonable.

As previously stated, there is nothing in the express language of Section 13-454 that restricts a sentencing court's ability to consider mitigating circumstances. In fact, Arizona's death penalty law is remarkably similar to the Florida statute upheld by the United States Supreme Court in Proffitt v. Florida, supra, and reexamined in Lockett v. Ohio, supra.[14] The legis-

lative history of Section 13-454 is likewise ambiguous. While petitioners cite developments which they claim are compatible with the view that the Arizona legislature intended a restrictive reading of the statute, there is nothing that demands such a conclusion.[15]

Petitioners' only remaining argument is that the Arizona Supreme Court's refusal to retract its earlier position that the legislature intended a restrictive interpretation of Section 13-454 at the time of enactment precludes a finding that Watson's holding was the product of legitimate statutory construction. This argument is likewise without merit.

While it is true that the Watson Court maintained the view that "Section F of A.R.S. § 13-454 is exclusive in that pursuant to Section D of A.R.S. § 13-454, the Court may consider as mitigating circumstances only those contained therein," State v. Watson, 120 Ariz. at 444, 546 P.2d at 1256, the court went on to hold that, at the time of enactment, the legislature would have preferred a broad reading of subsections D and F to an invalidation of the entire statute. Noting that its restrictive reading of Section 13-454 was "'severable from the rest in such a way that the legislature would be presumed to have enacted them independently . . . ', State ex rel Berger v. Superior Court, 106 Ariz. 365, 370, 476 P.2d 666, 671 (1970)", State v. Watson, 120 Ariz. at 452, 586 P.2d at 1264, the Watson Court went on to state that:

> We believe there is sufficient evidence in the legislative history of the enactment of this statute as well as the statute itself from which it is apparent that had the legislature anticipated that the legislation on mitigating factors would be found unconstitutional they would still have enacted the rest of the statute. Indeed, there is more than ample indication that the legislature intended a death penalty statute

and were prepared to write one that complied with the United States constitutional guidelines. Id. at 453, 586 P.2d at 1265.

Given the facts that neither the language nor the legislative history of Section 13-454 compel the conclusion that the Arizona legislature was opposed to open mitigation, and the state supreme court's findings that, at the time of enactment, the legislature would have preferred reinterpretation to statutory invalidation, there is sufficient basis on which to uphold the Watson interpretation of A.R.S. § 13-454.[16] This Court is aware of no further constitutional requirement that the state supreme court hold that its reinterpretation was originally intended by the legislature.

DOUBLE JEOPARDY

Those petitioners who have been resentenced pursuant to Watson or whose resentencing is pending, argue that the double jeopardy clause of the fifth amendment to the United States Constitution protects them from the imposition of a second death penalty. This contention must be rejected.

The double jeopardy clause does not prohibit resentencing per se. It prevents only an increase in sentence, or the imposition of multiple sentences for the same offense. North Carolina v. Pearce, 395 U.S. 711 (1969); Ex parte Lange, 85 U.S. 163 (1873). Furthermore no change is proscribed unless a defendant's original punishment has commenced.[17] Suggs v. Wilson, 403 F.2d 52 (9th Cir. 1968).

For obvious reasons, none of the petitioners claims to have actually begun serving his death sentence.

Moreover, it cannot be argued that petitioners resentenced pursuant to Watson have been subjected to multiple or increased penalties unless, between sentencing and resentencing, their death penalties were somehow reduced to life imprisonment. The Watson Court concluded that the defendant's death sentence was "merely set aside" upon the court's resentencing order, and that there had been no reduction to life imprisonment:

> There is no doubt that the double jeopardy clause applies to sentencing as well as conviction, Ex Parte Lange, 18 Wall. 163, 85 U.S. 163, 21 L.Ed. 872 (1873), and defendant cites several cases, two from California, People v. Harvey, 76 Cal.App. 3d 441, 142 Cal.Rptr. 887 (1978), and People v. Payne, 75 Cal.App. 3d 601, 142 Cal.Rptr. 320 (1977), as well as the South Carolina case of State v. Rodgers, 242 S.E.2d 215 (S.C. 1978) in support of his position. All three of these cases are distinguishable. In each of those cases, the defendants, after having been sentenced to death, had their sentences reduced to life imprisonment. After they had commenced to serve the life sentences, the state sought to have them resentenced under legislation enacted after the crime and the reversal. Thus, after the life sentences were at least partially served, the state attempted to subject them to another different and higher punishment. . . . We agree with the California court, but these cases are clearly distinguishable and do not apply to the case at bar. The defendant in the instant case never served his sentence (of death). His death sentence was not reduced to life imprisonment but was merely set aside pending resentencing. We find no violation of the double jeopardy clause in the instant case. See also North Carolina v. Pearce, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

State v. Watson, 120 Ariz. at 453, 586 P.2d at 1265.

Petitioners argue that People v. Harvey, 76 Cal. App. 3d 441, 142 Cal.Rptr. 887 (1978), and People v. Payne, 75 Cal.App. 3d. 601, 142 Cal.Rptr. 320 (1977), the two California Court of Appeals decisions distinguished in Watson, reflect a common law doctrine that "automatically"

imposes life sentences upon state death row inmates following the invalidation of a state's death penalty statute.[18] These cases do not support such an assertion.

In Rockwell v. Superior Court of Ventura County, 134 Cal.Rptr. 650, 556 P.2d 1101 (1976), which preceded Payne and Harvey, the California Supreme Court invalidated California's death penalty statute. Unlike the Watson Court, however, the Rockwell Court found that the revisions suggested by the government would exceed the scope of legitimate statutory interpretation and would be "contrary to manifest legislative intent." Id. at 665, 556 P.2d at 1116. Since the court was unable to repair the statute, it severed the portion authorizing the death penalty from the remaining penalty provisions and ordered that "petitioner may therefore be sentenced to a term of life imprisonment." Id. Given this language, the California Court of Appeals in People v. Harvey, supra, held that the "practical effect" of the Rockwell decision "automatically reduced appellant's sentence to life imprisonment." People v. Harvey, 76 Cal.App.3d at 447, 142 Cal.Rptr. at 891. See also People v. Payne, supra (in which the court of appeals had actually reduced the defendant's death sentence to life imprisonment pursuant to Rockwell prior to the state's motion for resentencing).

Contrary to petitioner's assertions, the above rulings by the California Court of Appeals did not and could not establish a common law doctrine applicable in all cases and all states where a death penalty statute has been invalidated. The Rockwell decision, which was interpreted in Harvey and Payne, is similar to State v. Watson only in that in each case the supreme court of a state was exercising its prerogative of passing on the

constitutionality of the respective state's death sentencing procedures. While the Watson Court found that the Arizona statute could be saved through statutory interpretation, the California court reached a contrary conclusion. In addition, the Watson Court held that the effect of its ruling was to simply "set aside" the defendant's death sentence pending resentencing, while the Rockwell Court held that the defendant's sentence must be reduced to life imprisonment.

This Court is aware of no constitutional principle which prohibits the course taken by the Watson Court, and finds that the question whether a state court's invalidation of its death penalty statute actually triggers a lesser sentence or merely "sets aside" a defendant's death penalty "pending resentencing" is one of state, and not constitutional law.

Petitioners' second double jeopardy argument is that Arizona statutory law operated to impose life sentences on petitioners the moment Watson invalidated its prior restrictive interpretations of Section 13-454. They point to Chapter 138, Laws of 1973, Section 10, which provides that

> In the event the death penalty is held to be unconstitutional on final appeal, a person convicted of first degree murder or another offense punishable by death who had been sentenced to die shall be resentenced by the sentencing court to life imprisonment . . . . (Emphasis added).

On the question whether Section 10 is applicable to the facts at hand, the Watson Court stated:

> Defendant contends that since we have found the death penalty unconstitutional, we therefore must sentence the defendant to twenty-five years. We do not agree.
>
> We did not find the death penalty to be unconstitutional. We held only that in

> in determining the death penalty there are certain factors which, if presented by the defendant, the court must consider. The statute, as severed is valid.

State v. Watson, 120 Ariz. at 453, 586 P.2d at 1265. The Arizona Supreme Court's holding that the life-sentence provision of Section 10 is activated only upon invalidation of the death penalty itself, as opposed to the statutory sentencing procedure, is not unreasonable.[19] This Court, therefore accepts the State court's interpretation of its own law, Poulos v. New Hampshire, 345 U.S. 395, 402 (1953), and holds that petitioners' resentencing pursuant to Watson does not violate the double jeopardy clause.

EX POST FACTO

The ex post facto clause of the United States Constitution prohibits:

> any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to the law at the time when the act was committed. . . .

Beazell v. Ohio, 269 U.S. 167, 169 (1925), (emphasis added); United States Constitution, art. I, § 10, cl. 1. Decisions by the Supreme Court demonstrate that the ex post facto clause embodies the concept that persons have a right to fair warning of the conduct which will give rise to criminal penalties:

> The constitutional prohibition and the judicial interpretation of [the ex post facto clause] rest upon the notion that laws, whatever their form, which purport to make innocent acts criminal after the event, or to aggravate an offense, are harsh and oppressive, and that the criminal quality attributable to an act, either by the legal definition of the offense or by the nature or amount of the punishment imposed for its commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused.

269 U.S. at 170. Although the ex post facto prohibition applies of its own force only to legislative acts, the Court has struck down unforeseeable judicial enlargements of criminal statutes as violative of due process when applied retroactively. See Marks v. United States, 430 U.S. 190 (1977); Bouie v. City of Columbia, 378 U.S. 347 (1964).

Petitioners contend that the retroactive application of Watson's interpretation of Section 13-454 amounts to the imposition of an ex post facto penalty in two respects. Emphasizing Watson's finding that a portion of Section 13-454 was unconstitutional, petitioners argue that the ex post facto clause protects them from the application of a newly enacted penalty.

Petitioners' second argument alleges that the differences between Section 13-454 and post-Watson sentencing are such that the retroactive application of the latter is likewise unconstitutional. The United States Supreme Court's recent decision in Dobbert v. Florida, 432 U.S. 282 (1977), answers both of petitioners' contentions.

In Dobbert, a Florida defendant was convicted of several murders which had occurred prior to April 8, 1972. The death penalty in effect at the time the murders were committed mandated that a person convicted of a capital felony was to be punished by death unless a majority of the jury recommended otherwise. On July 17, 1972, the Florida Supreme Court struck down this procedure as violative of the eighth and fourteenth amendments. Donaldson v. Sack, 265 So.2d 499 (Fla. 1972). Before Dobbert's trial, however, the Florida legislature enacted a new death penalty procedure which gave the court sole responsibility for sentencing. The defendant was tried and sentenced pursuant to this latter statute.

Like petitioners, Dobbert attempted to avoid his death penalty by emphasizing the fact that the sentencing statute in effect at the time of the murders was later held unconstitutional. The Supreme Court rejected the significance of this point, stating that the mere fact that a penalty statute is invalidated after a crime has been committed does not render the imposition of the same penalty a violation of the ex post facto clause if, at the time of the offense, "the existence of the statute served as an 'operative fact' to warn the [defendant] of the penalty which [the state] would seek to impose on him if he were convicted. . . ." 432 U.S. at 298.

While it cannot be seriously argued that Section 13-454 failed to serve as an "operative fact" in terms of the above quotation,[20] several petitioners would distinguish Dobbert on the basis that the defendant in that case was tried and sentenced under a constitutional death penalty statute. Those who were tried between the dates of this Court's decision in Richmond v. Cardwell and the State's decision in Watson and then sentenced pursuant to Watson point out that they were tried at a time when the state was enjoined from imposing the death penalty. Similarly, those petitioners who were tried and sentenced under the pre-Watson version of Section 13-454 and then resentenced under Watson emphasize that they were tried and sentenced pursuant to an unconstitutional death penalty statute before being resentenced under constitutional conditions.

While petitioners cite several state court decisions which have distinguished Dobbert on the basis that their defendants had been tried and sentenced under

unconstitutional death penalty statutes, including Meller v. State, 94 Nev. ____, 581 P.2d 3 (1978); State v. Rogers, 270 S.C. 285,242 S.E.2d 215 (1978), these cases do not state rationale which this Court finds persuasive in dealing with the facts before it. Dobbert, and other Supreme Court decisions discussing the ex post facto clause, see e.g., Beazell v. Ohio, supra, suggest that the two key areas for inquiry in the present case are the law at the time of the criminal act and the law at the time of final sentencing. The ex post facto clause only prohibits detrimental substantive alterations of the applicable law "at the time the act was committed." 269 U.S. at 169. This Court holds that, for ex post facto purposes, the status of the death penalty between the dates of petitioners' crimes and their final sentencing was irrelevant. What is important is that petitioners were forewarned of the existence of the death penalty at the time they committed their crimes and that the procedure by which they were ultimately sentenced was constitutional.[21]

Petitioners' second argument emphasizes the difference between the death sentencing procedures of Section 13-454, as interpreted in State v. Richmond, supra, and State v. Bishop, supra, and those under which they have been, or will be, sentenced. The Dobbert decision made it clear, however, that not all deviations from the law in effect on the date of an offense violate the ex post facto clause. See also Beazell v. Ohio, supra, Thompson v. Missouri, 171 U.S. 380 (1898); Hopt v. Utah, 110 U.S. 574 (1884). The retroactive application of a sentencing statute is permissible so long as the changes are either "procedural" or "ameliorative." Dobbert v. Florida, 432 U.S. at 293-94.

Statutory changes are procedural if they have "neither made criminal a theretofore innocent act, nor aggravated a crime previously committed, nor provided greater punishment, nor changed the proof necessary to convict." Id. at 293. See also Bearell v. Ohio, supra. If a change meets this definition, the "mere fact that it may work to the disadvantage of a defendant" is irrelevant. Id.[22]

Similarly, an "ameliorative" change, even if substantive, is one which fails to make a statute "more onerous than the prior law." Id. at 294. In making the determination whether a change is detrimental or ameliorative, the Court stated that "we must compare the two statutory procedures in toto to determine if the new may be fairly characterized as more onerous." Id.

The only difference between the pre-Watson version of Section 13-454, and the statute in its reinterpreted form, is that the Watson decision greatly expands the sentencing court's ability to consider mitigating circumstances. The Arizona Supreme Court's changes are thus "ameliorative" at worst, and cannot be relied on to show an ex post facto violation.

Petitioners who were, or will be, resentenced pursuant to Watson argue that despite the ameliorative nature of the Arizona Supreme Court's reinterpretation of Section 13-454, the resentencing court's ability to consider aggravating circumstances that may have surfaced since their original death sentences were imposed[23] renders the resentencing procedure unconstitutional.[24] This argument must also be rejected.

In North Carolina v. Pearce, 395 U.S. 711 (1969), the United States Supreme Court stated that

> the freedom of a sentencing judge to consider the defendant's conduct subsequent to the first conviction in imposing a new sentence is no more than consonant with the principle, fully approved in Williams v. New York, supra, that a State may adopt the 'prevalent modern philosophy of penology that the punishment should fit the offender and not merely the crime.'

Id. at 723 (quoting Williams v. New York, 337 U.S. 241, 247 (1949)). The Supreme Court's words are equally applicable in this case. The ability of a resentencing court to consider aggravating circumstances of which the original court was unaware in no way "change[s] the quantum of punishment attached to the crime." Dobbert v. Florida, 432 U.S. at 293-94. See also Thompson v. Missouri, 171 U.S. 380 (1898); Hopt v. Utah, 110 U.S. 574 (1884). Nor can this procedure, when compared "in toto" with the changes effected by Watson, be "fairly characterized as more onerous." Id. at 294. The resentencing court can consider not only a greater variety of mitigating circumstances than was permissible prior to Watson, but it can also consider mitigating circumstances that may have come to light since a petitioner's first sentencing.

SPEEDY SENTENCING

Several petitioners argue that the circumstances of their cases are such that resentencing pursuant to Watson infringed their rights to speedy sentencing[25] and/or due process. These arguments are based on allegations that events have transpired since petitioners were originally sentenced which make resentencing unfair. The allegations include the death or unavailability of mitigation witnesses, excessive delay, and oppressive presentence conditions. One Petitioner argues that during resentencing the court considered a prior felony conviction that, because of a

plea bargain, was not considered by the original sentencing court.[26]

Without commenting on the merits of any of the above contentions, this Court concludes that petitioners' speedy sentencing and/or due process arguments would be more appropriately handled in separate actions for the reasons that resolution of such issues would require consideration of the individual circumstances of each case.

ORDER

In accordance with the above Opinion,

IT IS ORDERED that this Court's Order of May 12, 1978, enjoining respondent from imposing the death penalty is hereby vacated, and the petition for writ of habeas corpus is dismissed.

So that petitioners may have time to appeal the Court's decision in this matter,

IT IS FURTHER ORDERED that respondent is enjoined from imposing the death penalty on any of the petitioners in the above entitled and numbered cause of action for a period of sixty (60) days from the date of entry of this Order, at which time this injunction will expire without further action by this Court.

DATED this 18th day of April, 1980, at Phoenix, Arizona.

C. A. MUECKE
Chief Judge
U.S. District Court

FOOTNOTES

1/ [Reference on page 1]

A.R.S. § 13-453 provides:

> Punishment for murder
>
> A. A person guilty of murder in the first degree shall suffer death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of twenty-five calendar years in the state prison, as determined by and in accordance with the procedures provided in § 13-454.
>
> B. A person guilty of murder in the second degree shall be punished by imprisonment in the state prison for not less than ten years. As amended Laws 1973, Ch. 138, § 2.

2/ [Reference on page 1]

A.R.S. § 13-454 provides:

> Proceedings for determining sentence upon the finding or admitting of guilt in cases of murder in the first degree
>
> A. When a defendant is found guilty of or pleads guilty to first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the circumstances set forth in subsection E and F, for the purpose of determining the sentence to be imposed. The hearing shall be conducted before the court alone.
>
> B. In the sentencing hearing the court shall disclose to the defendant or his counsel all material contained in any presentence report, if one has been prepared, except such material as the court determines is required to be withheld for the protection of human life. Any presentence information withheld from the defendant shall not be considered in determining the existence or nonexistence of the circumstances set forth in subsection E or F. Any information relevant to any of the mitigating circumstances set forth in subsection F may be presented by either the prosecution or the defendant, regardless of its admissibility under the rules governing admission of evidence at criminal trials; but the admissibility of information relevant to any of the aggravating

. . . . . .

circumstances set forth in subsection E shall be governed by the rules governing the admission of evidence at criminal trials. Evidence admitted at the trial, relating to such aggravating or mitigating circumstances, shall be considered without reintroducing it at the sentencing proceeding. The prosecution and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any of the circumstances set forth in subsection E and F. The burden of establishing the existence of any of the circumstances set forth in subsection E is on the prosecution. The burden of establishing the existence of the circumstances set forth in subsection F is on the defendant.

C. The court shall return a special verdict setting forth its findings as to the existence or nonexistence of each of the circumstances set forth in subsection E and as to the existence or nonexistence of each of the circumstances in subsection F.

D. In determining whether to impose a sentence of death or life imprisonment without possibility of parole until the defendant has served twenty-five calendar years, the court shall take into account the aggravating and mitigating circumstances enumerated in subsections E and F and shall impose a sentence of death if the court finds one or more of the aggravating circumstances enumerated in subsection E and that there are no mitigating circumstances sufficiently substantial to call for leniency.

E. Aggravating circumstances to be considered shall be the following:

1. The defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable.

2. The defendant was previously convicted of a felony in the United States involving the use or threat of violence on another person.

3. In the commission of the offense the defendant knowingly created a grave risk of death to another person or persons in addition to the victim of the offense.

4. The defendant procured the commission of the offense by payment,

or promise of payment, of anything of pecuniary value.

5. The defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

6. The defendant committed the offense in an especially heinous, cruel, or depraved manner.

F. Mitigating circumstances shall be the the following:

1. His capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution.

2. He was under unusual and substantial duress, although not such as to constitute a defense to prosecution.

3. He was a principal, under § 13-452, Arizona Revised Statutes, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution.

4. He could not reasonable have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person. Added Laws 1973, Ch. 138, § 5.

3/ [Reference on page 3]

On that same day, the United States Supreme Court vacated the judgment of the Arizona Supreme Court in Jordan v. Arizona, 114 Ariz. 452, 551 P.2d 1224 (1976) "insofar as it leaves undisturbed the death penalty imposed," Jordan v. Arizona, 438 U.S. 586 (1978). It is noteworthy that the defendant in Jordan presented no evidence in mitigation at his sentencing hearing and that the issue of the constitutionality of Arizona's restriction on mitigating circumstances was not discussed.

4/ [Reference on page 3]

The most significant difference between the pre-1979

version of A.R.S. § 13-703 and its predecessor, Section 13-454, was that the more recent statute added for consideration a fifth mitigating factor: the defendant's age.

5/ [Reference on page 4]

Respondent, by his Motion to Dissolve Injunction; Motion to Vacate Order Allowing Class Action; Motion to Determine Membership of Class, filed January 9, 1980, first asked for an order vacating this Court's Order of May 12, 1978, which permitted petitioner Knapp's suit to proceed as a class action under Rule 23(b)(1) and (b)(2), Fed.R.Civ.P., for the reason that many petitioners in this action have separate actions in which the questions here presented could be handled. The Court is of the opinion that the ends of justice and judicial economy are better served by permitting this case to proceed as a class action, and therefore denies this aspect of respondent's request. This Opinion will deal with respondent's alternative motions.

6/ [Reference on page 4]

Rather than discuss all of petitioners' arguments, the Court will address only those points that the Court finds dispositive. Petitioners' remaining arguments are either individual claims better raised in individual actions or are without substantial merit. Since the arguments not discussed here are not foreclosed by this Opinion and Order, there is no prejudice to petitioners in treating them summarily.

7/ [Reference on page 5]

This language is identical to that contained in Fla. Stat. Ann. § 921.141 (Supp. 1979), which the United States Supreme Court interpreted to permit consideration of all relevant mitigating circumstances in Proffitt v. Florida, 428 U.S. 242 (1975). See note 14, infra.

8/ [Reference on page 6]

That the Arizona Supreme Court was engaging in statutory interpretation when it held that "subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F," State v. Richmond, 114 Ariz. at 204, 560 P.2d at 50, was recognized by this Court in its 1978 decision in Richmond v. Cardwell, 450 F.Supp. 519 (D.Ariz. 1978). After discussing the mitigating factors contained in subsection F, this Court stated:

> Factors absent in this statute are (to name a few), considerations of the defendant's age at the time the crime was committed, his prior record; and the amount and nature of his co-operation with authorities, whether his capacity at the time of the crime was affected by mental defect or intoxication. Theoretically, if any of the above were relevant they might by implication be considered under one of the four mitigating factors listed in the Arizona statute. However, the Arizona Supreme Court has held otherwise. In State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1977), the court held that the four mitigating factors in A.R.S. § 13-454 are exclusive. The court eliminates the possibility of implying relevant mitigating factors from the ones listed, by stating 'we hold that subsection D authorizes the trial court to take into account only those mitigating circumstances enumerated in subsection F.'

Id. at 522 (emphasis added). This Court went on to observe that:

> The inescapable conclusion is that the Arizona Supreme Court in construing the statute in question and in an attempt to prevent it from

> becoming vague and ambiguous, has defeated the respondent's position that the factors which have been omitted from the death penalty statute can be considered, where relevant, as being implied by the four enumerated mitigating circumstances.

Id. at 523.

9/ [Reference on page 6]

On rehearing, the court referred to its prior holding using similar language: "This Court, in State v. Watson, . . . held that the restriction in the showing of mitigating circumstances in the sentencing provisions of our death penalty statute, Section (D) of 13-454, was unconstitutional." 120 Ariz. at 451-52, 586 P.2d at 1263-64. Again, the court invalidates that which must be read into the statute rather than a portion of the statute itself.

10/ [Reference on page 7]

The finding that neither the language nor the legislative history of Section 13-454 demand a restrictive interpretation, see text accompanying notes 13-15, infra, and that the Watson Court was merely overruling its prior interpretations in State v. Richmond and State v. Bishop, answer petitioner's arguments that the circumstances of this case preclude the Court's use of the "doctrine of severability" as a means of constitutionalizing the statute. Watson severed nothing, save for its own prior interpretations.

11/ [Reference on page 7]

More specifically, petitioners argue that Watson's resentencing order violated the eighth amendment as a judicial imposition of a penalty or that it amounted to

judicial legislation in violation of the constitutional guarantee of a republican form of government.

12/ [Reference on page 7]

In Lockett, the Court distinguished the statute with which it was dealing from those it upheld in Jurek v. Texas, 428 U.S. 262 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), on the basis that the Ohio statute scrutinized in Lockett expressly limited the number of mitigating circumstances the sentencing court could consider. 438 U.S. at 608. Although the Jurek and Proffitt statutes were unclear as to whether the court was so limited, they had been interpreted to permit consideration of all relevant circumstances. Lockett, supra, 438 U.S. at 606-607. It was this interpretation that saved them.

13/ [Reference on page 8]

The principal case relied upon by petitioners is Baird v. Bellotti, 450 F.Supp. 997 (D.Mass. 1978), in which a federal district court held Massachusetts' abortion statute unconstitutional. That case is distinguishable on a number of grounds, one of which is the court's finding that "the Massachussetts court, in addition to contradicting its specific terms, suggests reading into the statute affirmative provisions made out of nothing but a generally announced purpose to pass constitutional muster." Id. at 1005. Watson is not such a case. Other cases cited by petitioners include Mullaney v. Wilbur, 421 U.S. 684, 691 n. 4 (1971) ("On rare occasions the Court has re-examined a state-court interpretation of state law when it appears to be an 'obvious subterfuge to evade consideration of a federal issue.' Radio

Station WOW, Inc. v. Johnson, 326 U.S. 120, 129 (1945).") and Demorest v. City Bank Co., 321 U.S. 36, 42 (1943) ("Even though the constitutional protection invoked be denied on non-federal grounds, it is the province of this court to inquire whether the decision of the state court rests upon a fair or substantial basis."). This Court's findings regarding the reasonableness of the Watson's Court's reinterpretation of its own law make it unnecessary for it to pass on the applicability of these cases to the case at bar.

Finally, petitioners cite federal cases that discuss the role of a federal court in interpreting federal statutes, see e.g., United States v. Jackson, 390 U.S. 570 (1968), and cite state cases that discuss the means by which a state court should construe state legislation, see e.g., State ex rel. Berger v. Superior Court, 106 Ariz. 365, 476 P.2d 660 (1970). The question before this Court, however, involves federal review of a state supreme court's construction of a state statute. The above cases are not directly helpful here.

14/ [Reference of page 8]

See Fla. Stat. Ann. § 921.141 (Supp. 1979). Both statutes introduce their lists of mitigating circumstances with the language "mitigating circumstances shall be the following." Neither states whether its list is intended to be exclusive or illustrative. In Lockett v. Ohio, supra, the Supreme Court noted that it "assumed, in approving the [Florida] statute, that the range of mitigating factors listed in the statute was not exclusive." Lockett, supra, 438 U.S. at 606 (emphasis added). The Court went on to state that:

> The opinion of Justices STEWART, POWELL, and STEVENS in Proffitt, supra, noted that the Florida statute 'provides that "[a]ggravating circumstances shall be limited to . . .[eight specified factors]'" and that there was 'no such limiting language introducing the list of statutory mitigating factors.' (Citations omitted.)

Lockett, supra, 438 U.S. at 606 n. 15 (emphasis in original).

While there is language in the Florida statute that might make it more conducive to nonrestrictive interpretation than Section 13-454, these differences are not particularly significant. The Supreme Court in Proffitt, supra, was dealing with the question how the state's statute should be interpreted. Here, the state court has spoken. The only remaining issue is whether the interpretation which it eventually embraced is so unreasonable as to be unconstitutional. See note 13, supra.

15/ [Reference on page 9]

Neither State v. Richmond, supra, nor State v. Bishop, supra, cited legislative history in support of their holdings. Petitioners point to two events that occurred prior to the enactment of Section 13-454 which they feel demand the conclusion that the Arizona Legislature intended that the mitigating circumstances enumerated in subsection F be exclusive. The first incident emphasized by petitioners was the legislature's failure to enact a bill submitted by Attorney General Gary K. Nelson which provided for the consideration of more mitigating circumstances than those set forth in Section 13-454. Petitioners also point to the fact that Section 13-454, as finally enacted by the legislature, omitted a provision which had been included in the version passed

by the State House of Representatives. That provision provided:

> Evidence may be presented as to any matter the sentencing panel deems relevant to sentencing, and shall include matters relating to any of the aggravating or mitigating circumstances in sections b and c of this session.

Journal of the House, 31st Legislature, First Regular Session, at 499. While the above incidents might be compatible with the view that the legislature intended to restrict mitigation, they are not nearly so persuasive as to compel that conclusion.

Petitioners also find significance in the legislature's post-Watson enactment of A.R.S. § 13-703, which left Section 13-454 largely unchanged. That statute, however, was part of a revision of the entire criminal code, which went into effect on October 1, 1978. We find no indication that, in passing on Section 13-703, the legislature was voicing its rejection of Watson's conclusions as to legislative intent. In fact, the legislation could have been a reaction to the interpretation of the death penalty statute by the Arizona Supreme Court in State v. Richmond, supra, and State v. Bishop, supra. This Court finds more significance in the legislature's May 1, 1979, revision of Section 13-703, which codified the alterations made by the Watson court.

16/ [Reference on page 10]

A.R.S. §§ 1-211, et seq., sets forth the rules of statutory construction by which the Arizona courts are bound. Section 1-211 requires that the courts observe the rules set forth in Title 1, Chapter 2 " . . . unless such construction would be inconsistent with the

manifest intent of the legislature." A.R.S. § 1-211(A).

Section 1-211 also provides:

> B. Statutes shall be liberally construed to effect their objects and to promote justice.
> C. The rules of common law that penal statutes shall be strictly construed has no application to these revised statutes. Penal statutes shall be construed according to the fair import of their terms, with a view to effect their object and to promote justice.

In Watson, the Arizona Supreme Court indicated that the manifest intent of the legislture in enacting A.R.S. §13-454 was that there be a death penalty, not that the mitigating factors be limited in number. See Watson, supra, 120 Ariz. at 445, 453, 586 P.2d at 1257, 1265.

17/ [Reference on page 10]

Even when a defendant's sentence has commenced, double jeopardy does not prohibit a court from resentencing him to a different penalty where the original sentence was wholly illegal or completely void, see Bozza v. United States, 330 U.S. 160 (1947); United States v. Turner, 518 F.2d 14 (7th Cir. 1975), or where a defendant has obtained a reversal of his original conviction. See North Carolina v. Pearce, 395 U.S. at 720 ("And at least since 1919, when Stroud v. United States, 251 U.S. 15, was decided, it has been settled that a corollary of the power to retry a defendant is the power, upon the defendant's reconviction, to impose whatever sentence may be legally authorized, whether or not it is greater than the sentence imposed after the first conviction.") Moreover, in its 1899 decision in Murphy v. Massachusetts, 177 U.S. 155 (1899), cited in North Carolina v. Pearce, 395 U.S. at 720 n. 16, the Supreme Court held that the double jeopardy clause does not bar a court from

resentencing a defendant once he has successfully attacked his first sentence. In such circumstances, "it is well settled that a convicted person cannot by his own act avoid the jeopardy in which he stands, and then assert it as a bar to subsequent jeopardy." 177 U.S. at 158.

18/ [Reference on page 12]

Petitioners also cite this Court's Opinion in Richmond v. Cardwell, supra, as well as the United States Supreme Court's decisions in Lockett v. Ohio, supra, and Jordan v. Arizona, 438 U.S. 911 (1978), as having the effect of invalidating Section 13-454 and thus reducing their sentences to life imprisonment. Richmond v. Cardwell, supra, merely enjoined the execution of those petitioners who were parties to that action. While this Court found Section 13-454, as interpreted in State v. Richmond and State v. Bishop, to be unconstitutional, its ruling in no way invalidated Arizona's sentencing statute or reduced the penalties of those who were sentenced under it. The Supreme Court's decisions in Lockett v. Ohio, supra, and Jordan v. Arizona, supra, are also inapplicable. Lockett was concerned only with the law of Ohio, and had no direct impact on the validity of Arizona's statute. In Jordan, supra, the Supreme Court stopped short of invalidating Section 13-454. It merely vacated a death sentence that had been upheld by the Arizona Supreme Court and remanded for further proceedings in light of its decision in Lockett. See note 3, supra.

19/ [Reference on page 14]

See Discussion re Judicial Legislation, supra.

20/ [Reference on page 16]

Since none of petitioners was convicted of a murder occurring between the dates of this Court's decision in Richmond v. Cardwell, supra, and the Arizona Court's decision in State v. Watson, supra, the question whether Richmond's pronouncement that Section 13-454, as interpreted, was unconstitutional, prevented that statute from serving as an "operative fact" in terms of Dobbert is not presented. Petitioners who committed murders after Watson but before the enactment of the present version of A.R.S. § 13-703 argue that Watson cannot serve as an "operative fact" within the meaning of Dobbert. This argument, however, presupposes the inability of Watson to remedy Section 13-454 -- a position the Court does not accept.

21/ [Reference on page 17]

See also Beazell v. Ohio, 269 U.S. 167 (1925) (retroactive application of a statute making a defendant's right to a separate trial depend on his ability to show good cause therefore did not violate the ex post facto clause); Thompson v. Missouri, 171 U.S. 380 (1898) (statute which changed the rules of evidence after an indictment so as to render admissible against the accused evidence previously held inadmissible held constitutional); Hopt v. Utah, 110 U.S. 574 (1884) (law permitting adverse testimony of an ex felon upheld even though such persons were not competent on the date of the defendant's crime).

22/ [Reference on page 18]

By supplemental citation, petitioners point to the recent

decision by the Supreme Court of Kentucky in Hudson v. Kentucky, No. 78 SC 563 MR (April 1, 1980), in which the court refused to permit the retroactive application of the state's newly-enacted death penalty statute to a defendant whose crime had been committed prior to its enactment. The Hudson decision, however, was purely a matter of statutory interpretation, and is inapplicable to the present case.

23/ [Reference on page 18]

In State v. Valencia, ____ Ariz. ____, 602 P.2d 807 (1979), a post-Watson ruling, the Arizona Supreme Court upheld a resentencing court's decision to consider, as an aggravating circumstance, a rape conviction which had not been entered prior to the original sentencing hearing. The rape, however, had been committed prior to that hearing.

24/ [Reference on page 18]

This Court considers this question only as it affects the constitutionality of Watson's resentencing order. The appropriateness of a particular resentencing court's use of recent aggravating circumstances within the circumstances of an individual case is properly left to separate actions.

25/ [Reference on page 19]

See generally R. MISNER, Resentencing to Death under State v. Watson: A Denial of the Right to a Speedy Trial, 2 ARIZ. ST. L.J. 137 (1979).

26/ [Reference on page 20]

See response of Petitioner Valencia.